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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1304

CHARLES B. BRADLEY, JR., BYRON H. JOHNSON, ROBERT T. ODELL, JR., AND WILLIAM JAMES HELLIESEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 455 F. 2d 1181.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1972 (App. 19). The petition for a writ of certiorari was filed on April 10, 1972, and

was granted on June 12, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 26 U.S.C. (1964 ed.) 7237(d) survives the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970 so as to prohibit probation and parole for narcotics sellers who committed their offenses before the effective date of the new statute.

STATUTES INVOLVED

Section 4705(a) of the Internal Revenue Code of 1954, 68A Stat. 551, as amended, 26 U.S.C. (1964 ed.) 4705(a), provided:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary or his delegate. [Repealed, effective May 1, 1971. § 1101(b)(3)(A), Pub. L. 91-513, 84 Stat. 1292; § 1105(a), Pub. L. 91-513, 84 Stat. 1292.]

Section 7237 of the Narcotic Control Act of 1956, 70 Stat. 568, as amended, 26 U.S.C. (1964 ed. and Supp. V) 7237, provided in pertinent part:

> (b) Whoever * * * conspires to commit an offense, described in section 4705(a) * * * shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. * * *
>
> * * * * * *

(d) Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section * * * the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of Title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply. [Repealed, effective May 1, 1971, § 1101(b)(4)(A), Pub. L. 91-513, 84 Stat. 1292; § 1105(a), Pub. L. 91-513, 84 Stat. 1295.]

Section 1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1294, provides in pertinent part:

SEC. 1103.(a) Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section * * *, or abated by reason thereof.

Section 109 of the Act of July 30, 1947, 61 Stat. 635, 1 U.S.C. 109, provides in pertinent part:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability * * *.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted of conspiring, between March 4 and March 12, 1971, to sell cocaine in violation of 26 U.S.C. 4705(a). On June 2, 1971, after the May 1, 1971, effective date of the Comprehensive Drug Abuse Prevention and Control Act of 1970, each petitioner was sentenced to a five-year prison term, the mandatory minimum sentence prescribed by 26 U.S.C. 7237(b), which had been repealed by the Comprehensive Drug Abuse Act. The court of appeals affirmed their convictions. Thereafter, treating as an "appendage to their appeal" a motion to set aside sentence under Rule 35 of the Federal Rules of Criminal Procedure, it declined to remand the case for the district judge to consider granting probation. The court held that 26 U.S.C. 7237(d), which prohibited sentencing judges from suspending the sentences of narcotics offenders or placing them on probation, continued to apply to offenses committed before the effective date of the new Comprehensive Drug Abuse Act, even though petitioners were sentenced after its effective date.

SUMMARY OF ARGUMENT

The court below correctly determined that petitioners were ineligible for probation or parole, since the offenses for which they were convicted occurred before May 1, 1971. Section 7237(d) of the Narcotic Control Act of 1956 imposed an absolute ban on pro-

bation or parole for those convicted of selling or transferring certain narcotics. This absolute ban is modified by the Comprehensive Drug Abuse Prevention and Control Act of 1970, which became effective May 1, 1971. The new act provides, however, in Section 1103(a) that prosecutions for any violation of law occurring prior to May 1, 1971, shall not be affected by the repeal of the 1956 law.

Section 7237 and its legislative history demonstrate a clear congressional intent to establish a stringent system of penalties to discourage dealing in narcotics, including mandatory minimum sentences and the denial of the possibility of probation, suspension of sentence, or parole. Ineligibility for probation, suspended sentence, or parole was seen as a means of deterring the recruitment of "pushers," and, along with mandatory minimum sentences, was designed to make the penalty for violation of the law particularly severe.

The 1970 Comprehensive Drug Abuse Act adopted a more flexible approach to certain offenses committed after May 1, 1971, at least partly in recognition of difficulties in obtaining indictments and convictions under the previous law. The legislative history shows that Congress persisted in wanting to deal firmly with drug traffickers and that there was no intention to bestow leniency on persons who committed narcotics crimes prior to the effective date of the new law. This intent is clear not only from the language of the specific saving clause included as Section 1103 (a) and the legislative history of the 1970 Act, but

also from the difficulty that would result from the contrary approach. Since the new Act continues the ban on probation and parole for certain offenses (21 U.S.C. 848), an attempt to read Section 7237(d) as abated by the old Act presents two equally objectionable alternatives: Either the Parole Board must now assume the substantial and perhaps impossible burden of determining whether those convicted and sentenced under the old law would still be ineligible for parole under the standards set in the new law, or anomalously, all those sentenced under the old law are automatically eligible for parole under the new law, despite the congressional direction that certain offenders, even under the new law, are not eligible for parole. Neither of these alternatives was intended.

The conclusion that the bans on probation and parole in Section 7237(d) are preserved for offenses committed before May 1, 1971, is confirmed and implemented by the plain langauge of both the specific saving clause of the 1970 Act, Section 1103(a), and the general saving statute, 1 U.S.C. 109. Thus, automatic ban on probation and parole is saved as part of the "prosecution" of pre-repeal offenses referred to in Section 1103(a). It is also clear that the general saving statute applies to preserve the complete ineligibility for probation and parole for those charged under the 1956 Act. That statute states that the repeal of any statute shall not release any "penalty" incurred under such statute unless the repealing act expressly so provides. The repealing act here does not expressly so provide. The express stat-

utory denial of any possibility of probation or parole is part of the punishment for the offense, and thus saved by 1 U.S.C. 109 as a "penalty" that accrued at the time the offense was committed. Not only did Congress intend these denials to constitute part of the punishment for the crime, but they must naturally be perceived by the offender as part of his punishment.

ARGUMENT

An Offender Who Violates the Federal Narcotics Laws Prior to the Effective Date of the Comprehensive Drug Abuse Prevention and Control Act of 1970 Is Ineligible for Suspension of Sentence, Probation, or Parole Even If He Is Tried or Sentenced after the Effective Date of the New Act

At the time petitioners committed the narcotics offenses for which they were convicted, the statute defining the punishment for such offenses was 26 U.S.C. 7237. Subsection (b) of Section 7237 fixed a minimum term of imprisonment of five years, and subsection (d) provided that there could be no probation or parole for such offenses. The new Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 *et seq.*), which became effective on May 1, 1971, before petitioners were sentenced, repealed both 26 U.S.C. 4705(a) defining their offense, and 26 U.S.C. 7237 fixing its punishment. The new act retains prohibitions against probation, suspension of sentences, and parole for certain narcotics offenders engaged in "a continuing

criminal enterprise" (21 U.S.C. 848) [1] but otherwise allows suspension of sentence, probation, or parole. The new act provides, however, that prosecutions for any violation of law occurring prior to its effective date (May 1, 1971) "shall not be affected by the repeals or amendments" thereof. Public Law 91-513, Sec. 1103(a), 84 Stat. 1294.

The determination of the penalties for criminal offenses is essentially a matter of legislative policy, subject only to constitutional limitations. Thus in this case the controlling inquiry is the ascertainment of congressional choice. If that legislative judgment is sufficiently clear, it is conclusive, even if on one view of the underlying problem or another a different policy might seem wiser or more enlightened to some observers. *Gore* v. *United States*, 357 U.S. 386, 393; *Bell* v. *United States*, 349 U.S. 81, 82-83; cf. *Powell* v. *Texas*, 392 U.S. 514. Petitioners and the *amici curiae* concede that the sentence, including the Section 7237(b) five-year minimum sentence requirement, is part of the "prosecution", and thus is clearly meant to be preserved for their offense by

[1] The record does not indicate whether petitioners could have been prosecuted under 21 U.S.C. 848, if their offenses had been subject to the new law. Petitioners Bradley, Odell and Helliesen were also convicted of carrying firearms during the commission of a felony in violation of 18 U.S.C. (Supp. V) 924(c)(2). Each received a one-year suspended sentence and was placed on probation for three years, to commence after the expiration of his prison term. Thus, there is a possibility that, if probation were available, the district judge would consider placing them on probation.

the new act's saving clause, Section 1103(a).[2] The question at issue relates to the no-probation and no-parole provisions of Section 7237(d) for prior offenses. We shall show that the language of both the general saving statute, 1 U.S.C. 109, and the specific saving clause included by Congress in the new act, Section 1103(a), disclose and apply in clear terms the congressional decision that persons who engaged in narcotics sales prior to the effective date of the Comprehensive Drug Abuse Act are to be treated as if that act had never been passed. This means that they are subject to imprisonment for at least five years and also that they cannot be placed on probation and cannot be paroled. This is the import of the legislative history we shall discuss. The two

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[2] See Pet. Br. 14-15. See, also, *United States* v. *Fiotto*, 454 F. 2d 252 (C.A. 2), certiorari denied May 15, 1972, No. 71-1114; *United States* v. *Fithian*, 452 F. 2d 505 (C.A. 9). *United States* v. *McGarr*, No. 72-1108 (C.A. 7), decided April 28, 1972. This result is suggested by this Court's opinion in *Berman* v. *United States*, 302 U.S. 211, 212, where it was stated:

> Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller* v. *Aderhold*, 288 U.S. 206, 210; *Hill* v. *Wampler*, 298 U.S. 460, 464. * * * To create finality it was necessary that petitioner's conviction should be followed by sentence * * *.

See, also, *Stack* v. *Boyle*, 342 U.S. 1, 12; *Pollard* v. *United States*, 352 U.S. 354, 360 n. 4; *Brady* v. *Maryland*, 373 U.S. 83, 85 n. 1; *Corey* v. *United States*, 375 U.S. 169, 174.

A number of persons convicted and sentenced under the old law are nevertheless contending in petitions for writs of certiorari which are pending before this Court that the mandatory minimum terms set by Section 7237(b) are not saved by Section 1103(a). The memorandum for the United States in *Navarro* v. *United States*, No. 72-5045, lists these petitions.

relevant statutes achieve this objective because the denial of probation and parole comes within the meaning of "prosecution" in Section 1103(a) and within the meaning of "penalty" in Section 109, notwithstanding the intervening repeal of those automatic prohibitions.

A. *Absolute Ineligibility for Probation or Parole under Section 7237(d) Was Part of the Punishment Established by Congress for Dealing in Narcotics*

Probation is generally regarded as part of the sentencing process, and is thus an integral part of the "prosecution" to be governed by prior law under the saving clause in the Comprehensive Drug Abuse Act. We shall also show that ineligibility for probation and parole is covered as part of the "prosecution" of the offense referred to in the 1970 Act's saving clause and as part of the "penalty" for the prior crime included in the general saving statute. But we turn first to an analysis of the initial legislative judgment to forbid probation or parole to narcotics offenders to explain why this provision embodies part of the punishment for the crime. As we shall see, this was understood by Congress when it passed the 1970 Act. And in repealing the absolute prohibitions of Section 7237(d) for future offenses, there was no intent to ameliorate the severity of any penalties already accrued or to abate liability for them.

1. *Section 7237(d) was part of the punishment for offenses under the Narcotics Control Act of 1956.*

Section 7237(d) was added to the Internal Revenue Code by the Narcotic Control Act of 1956, 70 Stat.

567. It was part of Chapter 75 of the Internal Revenue Code, Part II, which is entitled "Penalties Applicable to Certain Taxes". The heading of Section 7237 referred to "Violation of Laws" and dealt specifically with the various "penalties" to be imposed on narcotics offenders. Subsections (a) and (b) dealt with mandatory minimum and maximum prison penalties and (c) dealt in detail with the handling of repeat offenders. Subsection (d) provided:

> Upon conviction [of certain narcotics offenses]:
>
> * * * * *
>
> the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code [authorizing release on parole] * * * shall not apply * * *.

Thus, we are not here dealing with probation or parole in the abstract; on the contrary, by the crisp terms of Section 7237, Congress manifested its determination to punish certain narcotics offenders by rendering them ineligible even to be considered for probation or parole after conviction.[8]

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[8] The way in which Section 7237(d) came into the law confirms the conclusion that it reflects another part of the punishment to be imposed as part of sentencing process. The original 1951 Boggs Act, 65 Stat. 767, effective November 2, 1951, 21 U.S.C. (1964 ed.) 174, contained mandatory penalty provisions, and prohibitions against suspension of sentence and probation for second or subsequent offenders. These same mandatory penalties and prohibitions were carried into Section 7237 (a) of the 1954 Internal Revenue Code. Ch. 75, Pub. L. 591, 68A Stat. 549, 860. The Narcotic Control Act of 1956 expanded Section 7237, turning the former Section 7237(a) into four

This analysis is confirmed by the legislative history of the Narcotics Control Act of 1956. That history shows a strong congressional intent to punish narcotic traffickers severely, in part by eliminating probation and parole as an element in the punishment prescribed for them. In order to determine the extent of the problem and to consider appropriate remedies, Congress held numerous hearings at which many experts testified. The Subcommittee on Narcotics of the House Committee on Ways and Means heard substantial evidence that, where probation was granted, narcotics trafficking increased. It heard testimony that 80 percent of the traffickers were first offenders who had prior records of crime outside of the narcotics area but were eligible to obtain suspended sentences and probation because they had no narcotics convictions. These were the people often being recruited in great number by multiple offenders. The Subcommittee concluded:

> With the possibility of receiving probation or a suspended sentence, these unscrupulous individuals are willing to risk apprehension for the fantastic profits derived from this type of crime. The markup in heroin sold to addicts in this country runs up to 10,000 percent over its cost at the source.

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separate paragraphs, increasing the mandatory penalties, applying the ban on probation and suspension of sentences to first offenders, and adding the ban on parole. The provisions prohibiting the suspension of sentence, probation and parole were placed in the new Section 7237(d) in order to avoid repetitiveness, since the prohibitions were being made applicable to new Section 176a and to 26 U.S.C. 4705(a) as well as to Section 174.

> Unless immediate action is taken to prohibit probation or suspension of sentence, it is the subcommittee's considered opinion that the first-offender peddler problem will become progressively worse and eventually lead to the large-scale recruiting of our youth by the upper echelon of traffickers. The penalties on peddlers with or without a record of prior convictions under our narcotics law must be made sufficiently severe to make the profits from this insidious commerce an inadequate inducement to assume the risks involved. [H. Rep. No. 2388, to accompany H.R. 11619, 84th Cong. 2d Sess. at 64.][4]

In its "Recommendations" to the entire Committee, the Subcommittee suggested that (*id.* at 69):

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[4] The recommendation of the Bureau of Narcotics was that the trafficker receive "a 5-year minimum, with no probation and no parole * * *." Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 84th Cong., October 13, 14, 18, 19, November 4, 7, 8, 10, 11, 14, 16, 17, December 14, 15, 1955, and January 30, 1956, p. 127.

Not all of the testimony was in favor of these prohibitions. The Deputy Attorney General, speaking for the Department of Justice, while recognizing that penalties are a matter for the legislature to determine, suggested that the courts should be allowed to retain their power to suspend sentences and place defendants on probation. See Statement by the Deputy Attorney General at Hearings before the Subcommittee on Improvements in the Federal Criminal Code of the Committee on the Judiciary of the United States Senate on S. 3760 (the Senate version of bill that passed) May 4, 1956, at 7, 8; see also, S. Rep. No. 1997, 84th Cong., 2d Sess. at 17, 18. Nevertheless Congress, although acknowledging "objections in principle to mandatory minimum penalties and prohibitions against suspended sentences" (S. Rep. No. 1997 to accompany S. 3760, 84th Cong., 2d Sess. at 23), decided they were justified.

* * * * *

> 2. The minimum and maximum penalties should be increased for all violations of the narcotic laws, both Federal and State, with parole eliminated.
>
> 3. Present penalties for traffickers in narcotics under the Boggs law would be increased to not less than 5 years for the first offense and not less than 10 years for second and subsequent offenses, with probation and suspension of sentences prohibited.

The Senate Report summarizes the legislative objective:

> [I]n order to define the gravity of this class of crime and the assured penalty to follow, these features of the law must be regarded as essential elements of the desired deterrents. * * *.[5]

Thus Section 7237(d) represented a clear and positive decision by Congress to make an absolute prohibition against suspension of sentence, probation, or parole an inherent part of the prosecution and punishment of the crime.[6]

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[5] S. Rep. No. 1997 to accompany S. 3760, 84th Cong., 2d Sess., at 6, quoting from the Report on the President's Interdepartmental Committee on Narcotics, February 1, 1956.

[6] See *Jones* v. *United States*, 419 F. 2d 593, 597 (C.A. 8), commenting on this section:

> "[T]he door is closed to *all* relief for the offender by way of suspension of sentence, probation, and parole. His sentence must be served. It is 'mandatory' in the true sense of the word."

2. *The 1970 Comprehensive Drug Abuse Act Was Not Intended to Ameliorate the Severity of Punishment for Prior Offenses.*

The new statute substantially revised the elements of the various narcotics offenses and the applicable penalty provisions. In contrast to the 1956 Act, which can fairly be described as basically punitive, the 1970 Act combines both the punitive and rehabilitative approaches. Its general philosophy is summarized in the House Report on the bill in these terms:

> 1) The illegal traffic in drugs should be attacked with the full power of the Federal Government. The price for participation in this traffic should be prohibitive. It should be made too dangerous to be attractive.
>
> 2) The individual abuser should be rehabilitated * * *.
>
> 3) Drug users who violate the law by small purchases or sales should be made to recognize what society demands of them. In these instances, penalties should be applied according to the principles of our present code of justice. When the penalties involve imprisonment, however, the rehabilitation of the individual, rather than retributive punishment, should be the major objective.[7]

Thus, for the "individual abuser", the emphasis now is on rehabilitation, and he is not even subject

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[7] H. Rep. No. 91-1444 (Part 1) to accompany H.R. 18583, 91st Cong., 2d Sess. at 9-10, quoting and adopting the Prettyman Commission report.

to a mandatory minimum prison term. However, under the old law, ineligibility for suspended sentence, probation, or parole only covered offenders involved in selling or otherwise transferring narcotics, and did not apply to mere possessors—"individual abusers". The new act is consistent with Section 7237(d) in retaining the punitive approach for the trafficker in illegal drugs. This is demonstrated by the fact that the ban on suspended sentences, probation and parole has been continued for persons who engage "in a continuing criminal enterprise" involving narcotics violations. 21 U.S.C. 848. Thus, a new distinction is introduced: in place of the denial of probation and parole to all those convicted of any sale or other transfer, the new law requires such denial for only some types of sellers. The penal object of this type of provision is clearly the same as when it had broader application under Section 7237(d).

But there is no indication that the flexibility introduced by the 1970 Act was intended to have any retroactive effect. Despite the premise of petitioners' argument, the action taken by Congress in repealing Section 7237(d) and allowing discretion as to probation and parole for some narcotics offenders was not primarily an expression of a desire for leniency. On the contrary, the legislative history shows that the dominant purpose of the new sentencing flexibility was not to benefit narcotics traffickers. The stated goal was more pragmatic: to increase the likelihood that drug pushers would be prosecuted and convicted. Thus, in explaining the bill's approach to penalties, the House Report stated:

> The foregoing sentencing procedures give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case.
>
> The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences.[8]

As this approach suggests, there is nothing in the legislative history to indicate a congressional desire to open up prior violations to the possibilities permitted by the new law for subsequent violations. The key question in this regard is whether Congress wanted offenders ineligible for parole under Section 7237(d) to become eligible for parole as a result of the repeal of that section. The answer to that

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[8] H. Rep. No. 91-1444 (Part 1), p. 11. The Senate Report is to the same effect.

question must be in the negative. Extension of parole eligibility to such offenders would confer a "windfall" not intended by Congress. The new law introduces a procedure for trying and sentencing offenders who are to be ineligible for probation or parole. (21 U.S.C. 848.) But there is no mechanism for the Parole Board to determine which offenders sentenced under Section 7237(d) would be ineligible for parole if tried and convicted under the new section. Moreover, it would involve a substantial administrative burden if the Board of Parole had to make an inquiry into the facts of each pre-May 1971 narcotics sale to ascertain whether the offender would be eligible for parole under the standards set in the Comprehensive Drug Abuse Act. Nowhere does it appear that Congress contemplated imposing such a burden. Nor is it reasonable to impute to Congress a desire that all persons convicted of selling narcotics prior to May 1971 would now be eligible for parole. Since some offenders under the new act are still absolutely barred from parole, that anomalous result would stand congressional intent on its head.

The only conclusion that can be drawn is that Congress, by its silence on the subject, intended no change in the status of persons who engaged in narcotics sales before the effective date of the new act.[9]

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[9] The *amici curiae* brief filed on behalf of seven women prisoners argues that equal protection considerations require the construction of the new act to make the repeal of Section 7237(d) retroactive, and thus render all offenders convicted under the 1956 Act eligible for parole. It is the function of the legislature to determine the severity of the punishment to

It is against this background of congressional determination to use denial of probation and parole as punishment for certain narcotics violations, and it is in the light of this stern approach to narcotics sellers being taken by Congress even in the 1970 Act, that the Court must decide the application of the general saving statute and of the specific saving clause of the 1970 Act. To those inquiries we now turn.

B. *Both the Specific Saving Clause and the General Saving Statute Preserve the Application of Section 7237(d) to Offenses Committed Before May 1, 1971.*

The plain language of the saving statutes makes clear that the benefits of suspension of sentence, probation, and parole were not to become retroactively applicable to offenses for which they were forbidden at the time the offenses were committed.

The general saving statute, 1 U.S.C. 109, originally enacted in 1871, provides:

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be inflicted for similar offenses, and the fact that some offenses are punished with less severity than others is no denial of equal protection. See *Collins* v. *Johnston*, 237 U.S. 502, 510. Here Congress has decided that even under the new act certain narcotics violations should be subject to a ban on probation and parole. It is not unreasonable or invidious to determine that the new punishment distinctions should apply only in accordance with the newly created substantive distinctions. This Court has never held or intimated that equal protection requires Congress to give retroactive effect to new penalty provisions that are less severe than those in force at the time of violations. This Court's decisions on retroactivity indicate that classifications like this are reasonable. See *Linkletter* v. *Walker*, 381 U.S. 618, 629; *Johnson* v. *New Jersey*, 384 U.S. 719, 727.

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability * * *.[10]

Section 1103(a) of the 1970 Act specifically provides that:

> Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section * * *, or abated by reason thereof.

The natural thrust of these sections is to preserve the *status quo ante* for offenders who violated the law before it was altered. That is what the legislative history of the 1970 legislation persuasively suggests was understood and intended. An analysis of those sections, if necessary, confirms the conclusion that the probation and parole questions are controlled by the law as it stood when petitioners violated it.

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[10] At common law, when a criminal statute was replaced by another statute or was amended lessening punishment, the defendant was entitled to the benefit of the new Act, although his offense was committed prior to the effective date thereof, unless there was a general saving statute or a specific clause in the new act. *United States* v. *Reisinger*, 128 U.S. 398; *Moorehead* v. *Hunter*, 198 F. 2d 52 (C.A. 10).

1. *The Specific Saving Clause—Section 1103(a)*

The first question in this case—the availability of probation—can be disposed of quickly on the ground that a judge's decision on suspension of sentence and probation is generally accepted to be a part of the sentencing process. Thus the ban on probation for petitioners' offense is preserved as part of the "prosecution" of their crime as that term is used in the specific saving clause.

Petitioners do not deny that the sentence is part of the "prosecution" referred to in Section 1103(a). But the grant or denial of probation is part of the sentencing process, and petitioners' claim to eligibility for probation must therefore fail. In *Korematsu* v. *United States*, 319 U.S. 432, the defendant was placed on probation without being sentenced and no further court order was anticipated. The question before this Court was whether the conviction was reviewable on appeal, since neither imprisonment nor a fine had been imposed. In holding the conviction reviewable, the Court reasoned that probation is simply a milder form of punishment than incarceration. Hence, the order placing the defendant on probation was final, since it imposed a penalty, and terminated the prosecution on the merits.[11] In essence, the Court held that probation was the sentence. This is evident from the Court's statement that (319 U.S. at 435):

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[11] See *Phillips* v. *United States*, 212 F. 2d 327, 334 (C.A. 8): "Probation * * * is discipline under supervision, without incarceration * * *".

> The difference to the probationer between imposition of sentence followed by probation, as in the *Berman* case, and suspension of the imposition of sentence, as in the instant case, is one of trifling degree. * * * Here litigation "on the merits" of the charge against the defendant has not only ended in a determination of guilt, but it has been followed by the institution of the disciplinary measures which the court has determined to be necessary for the protection of the public.

The statute which grants to the courts the authority to suspend sentences and place defendants on probation (18 U.S.C. 3651) provides:

> Upon entering a judgment of conviction of any offense * * * any court * * * may suspend the imposition or execution of sentence and place the defendant upon probation * * *.

If probation is going to be granted, it is to be done at the time of sentencing, and the probationary power of the courts ceases once the defendant is imprisoned. *United States* v. *Murray*, 275 U.S. 347, 358; *Affronti* v. *United States*, 350 U.S. 79, 83; *Glouser* v. *United States*, 340 F. 2d 436 (C.A. 8), certiorari denied, 381 U.S. 940. The court in *United States* v. *Ellenbogen*, 390 F. 2d 537, 543 (C.A. 2), certiorari denied, 393 U.S. 918, stressed that:

> [T]he time of sentencing [is] the appropriate occasion for probation to be considered by the trial judge. This emphasis is consistent with both the underlying purpose of the Probation Act and the time when it was intended that the

district court should invoke its provisions. The clear purpose of the statute is to authorize a form of punishment without incarceration which may be utilized by a sentencing judge in a case where he believes the defendant will best be rehabilitated without undergoing actual imprisonment. * * *[12]

The Ninth Circuit in *United States* v. *Stephens*, 449 F. 2d 103, in holding that probation was available to a defendant sentenced after the effective date of the new act for an offense committed under the prior act, ignored the established meaning of the term "prosecution" used in Section 1103(a).[13]

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[12] Further support for the view that sentence is meant to encompass probation is provided by Rule 32 of the Federal Rules of Criminal Procedure. Rule 32(b) requires that a judgment of conviction set forth the defendant's sentence, in addition to the plea, the verdict and the adjudication. Rule 32(c) provides for the probation service to make a pre-sentence investigation and to include in the report any factors bearing on the imposition of sentence and the grant of probation. And Rule 32(e), providing that a defendant may be placed on probation after conviction of a non-capital crime, further shows that probation may be the sentence.

[13] In so doing, the court suggested that "[a]llowing * * * [p]robation permits a salutary tempering of the arbitrariness which otherwise would result from hewing to a cut-off date in transition from old to new law * * *." 449 F. 2d at 107. The answer to that suggestion is that any transition from old to new law involves the making of a cut-off that represents one choice among several options. The point at which that cut-off comes is a matter for legislative determination; in this case, Section 1103(a) indicates a clear congressional intent that the old law applies to "any violation of law occurring prior to the effective date" of the new act. The Ninth Circuit rule, as interpreted in *Noriega-Arjona* v. *Bureau of Prisons*, No. 72-1668 (C.A. 9, decided July 14, 1972), holds that defendants

The more significant issue in this case, in terms of long range impact, is whether the Section 7237 (d) ban on parole continues to apply to pre-May 1971 offenses. While the parole decision may not be part of the "prosecution" of a crime in the ordinary sense,[14] we have seen above that Congress viewed the

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sentenced before May 1, 1971, are ineligible for parole. This rule abandons the legislative choice of a cut-off date, the time of the commission of the offense, and substitutes instead one based entirely on the exigencies of trial. The court-selected date is surely no more compelling than the legislative directive that the law at the time of the commission of the offense is to govern the case at all stages. Moreover, the *Stephens* rule has led to inconsistent results in the Ninth Circuit district courts. Compare *Arjona, supra*, with *Batista* v. *United States*, No. 6301—Crim. (C.D. Cal., decided April 21, 1972) (modifying, on the basis of *Stephens*, a sentence imposed on October 29, 1970, to permit parole) and *United States* v. *Pregerson*, 448 F. 2d 404, 406 (C.A. 9), (remanding a suspended sentence imposed February 10, 1971, as beyond the court's power at that time, but explaining, "Initially, we leave to the district judge the question of whether he can now sentence under the legislation which became effective on May 1, 1971").

[14] The Court in *Morrissey* v. *Brewer*, No. 71-5103, decided on June 29, 1972, in approaching completely different issues, stated the general rule that parole is not part of the prosecution. The issue was whether the procedural rights that apply before and at a criminal trial apply also to parole revocation. We do not agree with the *amici curiae* brief filed on behalf of seven women prisoners that *Morrissey* requires that parole now be made available for pre-May 1, 1971, narcotics offenses. *Morrissey* only indicates that, for certain purposes, the decision to grant or deny parole by administrative authorities is not considered part of the "prosecution." But that decision does not even by implication argue against our position that a statutory provision precluding the possibility of parole for

absolute ineligibility for parole upon conviction for a narcotics offense as part of the punishment for the offense. Thus, we contend that the ineligibility for parole as directed by Section 7237(d) was part of the "prosecution" for the offenses covered by that section as Congress used the term in the specific saving clause in the 1970 Act. That was, we believe, the expectation of Congress. But it is not necessary to define the precise denotation of the word "prosecution"; the language of the general saving statute, which co-exists with the specific clause, provides clear statutory authority for enforcing the congressional decision to leave prior offenses unaffected, both as to the grant of probation and ineligibility for parole.

2. *The General Saving Statute—1 U.S.C. 109*

All the considerations discussed above which make the prohibitions of Section 7237(d) a part of the sentence show that it was intended to be a "penalty" or "liability" under 1 U.S.C. 109.[15] In *United States*

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a specific class of offenses is part of the punishment for those offenses, and thus part of their "prosecution" as that term is used in the specific saving clause of the 1970 Act.

[15] Beginning with *United States* v. *Reisinger*, 128 U.S. 398, the general saving clause has been held to apply to criminal laws and the punishments attached to them, and the effect has been to preserve the vitality of an amended or repealed law for purposes of both prosecuting and punishing offenses committed while the law was in effect. See *Lovely* v. *United States*, 175 F. 2d 312 (C.A. 4); *Hurwitz* v. *United States*, 53 F. 2d 552 (C.A. D.C.); *Duffel* v. *United States*, 221 F. 2d 528 (C.A. D.C.); *United States* v. *Kirby*, 176 F. 2d 101 (C.A. 2); *United*

v. *Reisinger*, *supra*, 128 U.S. at 402-403, this Court held that the term "liability" is synonomous with the term "punishment." "[T]hese words [penalty, forfeiture or liability] * * * were used by Congress to include all forms of punishment for crime * * *."

The Ninth Circuit's conclusion in the *Stephens* case (449 F. 2d at 106), that the grant of probation does not amount to the extinguishment of a penalty since it "does not wipe clean the defendant's penal obligation" misses the mark. The real question is whether the unavailability of probation and parole is a part of the penalty. The answer to that question is evident not only in terms of demonstrable congressional intent, as shown above, but also from the viewpoint of the convicted defendant. From that vantage point, his penalty is very substantially "released or extinguished" if he is placed on probation instead of being incarcerated. A convicted prisoner who has been paroled undoubtedly also believes that the parole constitutes a most substantial release of penalty. See *United States* v. *Ross*, No. 72-1135 (C.A. 2, decided June 13, 1972, sl. op. 3480). The converse is equally true: ineligibility for probation and parole by reason of the conviction itself is naturally regarded as an integral part of the "penalty" for the crime. The

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States v. *Brown*, 429 F. 2d 566 (C.A. 5); *Faubion* v. *United States*, 424 F. 2d 437 (C.A. 10); *Maceo* v. *United States*, 46 F. 2d 788 (C.A. 5); *United States* v. *Smith*, 433 F. 2d 341 (C.A. 4); *Stillman* v. *United States*, 177 F. 2d 607 (C.A. 9); *United States* v. *Carter*, 171 F. 2d 530 (C.A. 5); *United States* v. *Taylor*, 123 F. Supp. 920 (S.D. N.Y.), affirmed on opinion below, 227 F. 2d 958 (C.A. 2).

Sixth Circuit stated the correct view in *Harris* v. *United States*, 426 F. 2d 99, 100:

> It may be "legislative grace" for Congress to provide for parole but when it expressly removes all hope of parole * * * this is in the nature of an additional penalty * * *."

If the prohibition against probation and parole is a "penalty" (whether or not part of the "prosecution" for the purpose of the specific saving clause) it is saved by 1 U.S.C. 109. It has long been held that 1 U.S.C. 109 must be construed as part of subsequent repealing statutes, unless there is an express provision to the contrary in the repealing statute. *E. g.*, *United States* v. *Reisinger*, 128 U.S. 398, 402-403; *United States* v. *Carter*, 171 F. 2d 530, 532 (C.A. 5).

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[18] Indeed, a guilty plea taken without informing a defendant of his ineligibility for probation or parole is deemed by many courts to be invalid. *Munich* v. *United States*, 337 F. 2d 356, 361 (C.A. 9); *Berry* v. *United States*, 412 F. 2d 189, 193 (C.A. 8); *Jenkins* v. *United States*, 420 F. 2d 433, 437 (C.A. 10); *Harris* v. *United States*, 426 F. 2d 99 (C.A. 6); *Bye* v. *United States*, 435 F. 2d 177 (C.A. 2). See, contra, *Trujillo* v. *United States*, 377 F. 2d 266 (C.A. 5), certiorari denied, 389 U.S. 899, and *Smith* v. *United States*, 324 F. 2d 486 (C.A. D.C.), certiorari denied, 376 U.S. 957.

Amicus De Simone argues that Section 7237(d) affects only remedies and procedures, rather than substantive rights or penalties, and thus that it is not preserved by Section 109. For the reasons stated above, we believe it is clear that Section 7237(d) was intended by Congress to constitute part of the penalty. We believe De Simone's argument is without merit. The case upon which he relies, *Hollowell* v. *Commons*, 239 U.S. 506, is not in point; there, the Court held that the sole change in the statute was the change of the tribunal. Here, in contrast, Section 7237(d) imposes an additional penalty.

This is true even when the repealing act contains its own specific saving provision, as long as the repealing act does not provide otherwise. See *Duffel* v. *United States*, 221 F. 2d 523, 524 (C.A. D.C.); *United States* v. *Kirby*, 176 F. 2d 101, 104 (C.A. 2); *Lovely* v. *United States*, 175 F. 2d 312, 316 (C.A. 4). The repealing act in this instance does not attempt to bar the application of the general saving statute.

Petitioners contend that if the general statute were to control in this case the specific saving provision would be without purpose. This argument is unpersuasive. There are sound reasons for Congress to insert a specific saving clause in the repealing act, even though the general statute exists. The most obvious reason is to manifest congressional intent explicitly at the time of adoption, underscoring the inapplicability of the new measure to past violations.

Moreover, legislative redundancy is not uncommon. It is true that if there is a specific clause in the repealing act the courts generally look to that first, since it is the more recent enactment; but that does not mean that Section 109 does not apply. In *Great Northern Railway Co.* v. *United States*, 208 U.S. 452, 465, in discussing how the general saving statute (then Rev. Stat. 13) is to be treated when the repealing act has its own saving clause, the Court explained:

> As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Con-

gress as manifested either expressly or by necessary implication in a subsequent enactment. But while this is true the provisions of § 13 are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of § 13.[17]

Nor does *Hertz* v. *Woodman*, 218 U.S. 205, relied upon by petitioners, stand for the proposition that the saving clause contained in the repealing act controls to the exclusion of 1 U.S.C. 109. The Court in that case did not hold that the general and specific clauses were in conflict—it simply stated that if they had been in conflict, the specific would have prevailed.

The Ninth Circuit in *Stephens* took the position that Section 7237(d) was not the kind of statute to which Section 109 relates. To support this proposition, that Court relied on dicta in *Hamm* v. *City of Rock Hill*, 379 U.S. 306, where the defendant had been convicted under state trespass statutes for peacefully sitting-in at public lunch counters. The *Stephens*

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[17] In *United States* v. *Robinson*, 336 F. Supp. 1386 (W.D. Wis.), the court held that the defendant was not eligible for probation because "prosecutions" under § 1103(a) encompassed probation. The court continued:

> If there was any doubt concerning the meaning of the savings clause in the 1970 Comprehensive Drug Abuse

opinion quoted the statement in *Hamm* that Section 109 "was meant to obviate mere technical abatement." But the *Stephens* opinion itself points out that this Court has applied Section 109 to avoid "non-technical" abatements—those where there has been a substantive change in the law (*Stephens*, 449 F. 2d at 105, n. 6). At common law, the repeal of a statute or change in the definition or punishment of an offense created a "technical abatement" of any prosecution commenced thereunder. A "nontechnical" abatement resulted when the conduct involved was no longer a crime under the new law. In *Hamm*, the conduct was no longer a crime, but beyond that it had become affirmatively protected by statute, and thus transformed into a right. It is clear that the offense of selling cocaine without a written order form has undergone no such transmutation from prohibited crime to protected right as had the conduct in *Hamm*. In *Pipefitters Local Union No. 562* v. *United States*, No. 70-74, decided June 22, 1972, this Court similarly distinguished *Hamm* as applying only where a right is substituted for a crime. Although subsequent legislation there made lawful what had been a crime, the Court held that the general saving statute left the pre-repeal conduct fully punishable. And significantly, the Court reached that conclusion even after finding that there was no demonstration

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Prevention and Control Act, and the Court does not believe there is any doubt, the same result would follow—that defendant's motion must be overruled—because of the express provisions of 1 U.S.C. § 109. [*Id.* at 1387-1388.]

of specific congressional intent on this point when the new act was passed.

The application of the general saving statute to the present case is therefore much stronger. Under both old and new acts, petitioners' conduct remained criminal; the new act simply altered the specific elements of certain offenses and changed the penalties. And both the legislative history about the purposes of the legislation and the inclusion of a specific saving clause manifest congressional intent to let the pre-repeal law control pre-repeal violations.[18]

The court below (and the Second Circuit in *United States* v. *Ross*, *supra*, at 3481-3482) therefore cor-

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[18] The *Amicus* De Simone argues that, since Congress allowed parole for those already convicted when it passed the original parole statute in 1910 (Act of June 25, 1910, c. 387, § 1, 36 Stat. 819) and since it passed a law providing for the release on parole of persons confined under the no-parole marijuana sentences (Pub. L. 89-793, § 502, 80 Stat. 1449), the right to parole should be recognized in the instant case. But De Simone's argument carries its own refutation. In the instances he mentions it was the explicit judgment of Congress, not the strained judicial interpretation he seeks, that allowed those already convicted to become eligible for parole.

Compare *United States* v. *Taylor*, 123 F. Supp. 920 (S.D. N.Y.), affirmed, 227 F. 2d 958 (C.A. 2), where the defendant was convicted of violating the Boggs Act, 21 U.S.C. 174. At the time of the commission of the offense the maximum penalty was ten years' imprisonment, but prior to trial and imposition of sentence the maximum penalty was reduced to five years. The court held:

> Had Congress so intended it could readily have made available as to those guilty of offenses committed prior to the effective date of the Boggs Act the benefit of the reduced penalty. But the statute indicates no such purpose.

rectly rejected the *Stephens* approach and held that the general saving statute, 1 U.S.C. 109, does operate to preserve the prohibitions against probation and parole for offenders, like petitioners, who committed their crimes before the effective date of the Comprehensive Drug Abuse Act.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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